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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1637

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

THE MAGNAVOX COMPANY OF TENNESSEE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE MAGNAVOX COMPANY OF TENNESSEE

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BRIEF FOR THE MAGNAVOX COMPANY OF TENNESSEE

QUESTION PRESENTED

Whether the facts and circumstances of this case allow the duly certified and authorized bargaining representative to waive the right of employees whom it represents to distribute literature on Company property.

STATEMENT

The Respondent adds to its earlier statement[1] the following: the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC[2] has consistently and without exception recognized and acquiesced in the Company's no-distribution policy since its initial certification in late 1954. (Pet. App. 36-37; A. 53-54, 56, 65, 70-73, 77-78, 81, 95, 99-100, 103, 128).[3] The policy or rule prohibited all distribution of literature on Company property by any persons, including its employees. (A. 30-31, 57-58). Throughout the years, the Union has frequently distributed handbills to the employees as they were coming to or leaving work. The distributors, however, have always stood at the gates off Company property to make their distributions; and there is no evidence that their efforts were never less than completely successful using this method of distribution. (A. 56, 65, 77-78, 99, 103). In addition, the Company has maintained a solicitation rule allowing employees full freedom of discussion during non-work time in all areas of the plant. (A. 127, 136).

Throughout this period no grievance has ever been filed protesting the Company's no-distribution policy nor has the Union ever attempted to change the Company's rule through the negotiation process, although several contracts have been negotiated. (Pet. App. 33, 36-37, 57, 97).

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[1] Opposition to certiorari, pp. 3-5.
[2] Hereinafter referred to as the "IUE" or "Union".
[3] "Pet. App." refers to the Appendix of the Petition for Certiorari. "A." refers to the separate Appendix to the Briefs.

The Company offered to prove that there was no organizational drive taking place, or rival-union activity at the Company at the time the unfair labor practice charge was filed. The offer of proof was rejected, but the trial examiner assumed that the situation did not exist. (A. 33-35).

The National Labor Relations Board[4] found that the Union had in fact waived the right of all bargaining unit members to distribute literature for any purpose on the Company's premises. The Board, however, abandoning its existing precedent in *Gale Products, Inc.*,[5] concluded that the incumbent union's waiver was not binding upon any of its bargaining unit members insofar as it permitted the Company to prohibit the employees from distributing literature on behalf of either the incumbent or a rival labor organization "which pertains to: (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) other matters related to the exercise by employees of their Section 7 rights." (Footnote omitted) (Pet. App. C, p. 24).

The United States Court of Appeals for the Sixth Circuit denied enforcement of the Board order holding that a "bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here." (Pet. App. A, p. 15)

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[4]Hereinafter referred to as the "Board" or "Petitioner".
[5]142 NLRB 1246 (1963), *enf. denied* 337 F.2d 390 (7th Cir., 1964).

ARGUMENT

The facts and circumstances of this case permit the waiver of employee distribution of literature on Company property by the duly certified and authorized collective bargaining representative and the Company. The Court is presented in this case with uncontradicted facts showing an absence of organizational activity, free ability of employees to solicit their fellow workers, and totally effective, although inconvenient, alternative means of distribution. In such circumstances, the Board's injecting itself into the collective bargaining process, and the mechanistic application by it of rules derived from and applicable to unilaterally imposed no-distribution rules, together with the relief sought by the Board, undermines and is counter-productive to the National Labor Relations Act's[6] central purpose of industrial peace and freedom of contract.

I. The Distribution Of Literature By Employees On Company Property Is Not So Fundamental That It Cannot Be Contractually Waived, And It Was Arbitrary And Capricious For The Board To Find Otherwise Under The Facts And Circumstances Of This Case.

There are many means of oral and written communication which allow employees to effectively communicate with each other to exercise their rights under Section 7 of the Act. Distribution of literature on company

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[6]Hereinafter referred to as the "Act".

property is therefore only one means available to employees for self-organization. The United States Court of Appeals for the Seventh Circuit recognized this when it denied enforcement to the Board's order in the *Gale Products*[7] case:

> The contract provisions here assailed did not strip the employees of fundamental rights guaranteed by the Act. The provisions preclude only a convenient — albeit a most effective — way of their exercise. Employees are free to forego their qualified rights to on the premises organizational activity in favor of the available alternatives thereto. 337 F.2d 390, 392.

Because distribution of literature is only one means of exercising the end of self-organization and not an end in itself, the Company submits that the various "available alternatives" become highly relevant and must be examined before determining that the waiver of one has impaired organizational rights under Section 7 of the Act; and it becomes the special duty of the Board to appraise carefully in the diverse circumstances of each case whether the employee rights have been truly diminished. *National Labor Relations Board* v. *United Steelworkers of America (Nutone, Inc.)*, 357 U.S. 357, 362-363 (1958); *Armco Steel Corporation* v. *National Labor Relations Board*, 344 F.2d 621 (6th Cir., 1965).

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[7] *National Labor Relations Board* v. *Gale Products, Division of Outboard Marine Corporation*, 337 F.2d 390, 392 (7th Cir., 1964).

Prior to its decision in the instant case, Board doctrine has recognized that the distribution of literature was not so fundamental an act for it had held that an incumbent union could effectively waive the right of employees to distribute literature in its behalf on company premises. The Board had refused, however, to give effect to an agreement between an incumbent union and an employer to the extent that that agreement proscribed distribution by employees in behalf of a rival labor organization so long as the distribution was confined to non-work time and non-work areas. *Gale Products, supra,* 142 NLRB 1246; *Armco Steel Corp.*, 148 NLRB 1179 (1964); *Mid-States Metal Products, Inc.*, 156 NLRB 872 (1966); *General Motors Corp.*, 158 NLRB 1723 (1966); *IAM, District 9*, 171 NLRB 234 (1968).

Of the United States Circuit Courts of Appeal that have confronted this doctrine only the Fifth Circuit has held that the right was "too fundamental to be contracted away by the union as was done here." *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F.2d 702, 706 (5th Cir., 1968). However, less than a month later the Fifth Circuit altered its position by its holding in *Mason & Hanger-Silas Mason Company* v. *National Labor Relations Board*, 405 F.2d 1 (5th Cir., 1968). There, as in this case, no organizational activity was taking place. The Fifth Circuit distinguished its ruling in *Mid-States* on this very point, holding that:

> ...The specific Section 7 rights involved in *Mid-States* related to the selection or non-se-

> lection of a bargaining agent. The instant case, on the other hand, concerns activity for the purpose of economic advantage. Consistent with the rationale of *Mid-States*, we feel that the interests of contractual stability sufficiently outweighs considerations of individual rights in this case so as to make appropriate, where applicable, the enforcement of the contractual prohibition against solicitation. 405 F.2d 1, 5.

Under the facts of the instant case the Petitioner's heavy reliance (Board brief, pp. 8, 12, 13, 14, 17) on the Fifth Circuit's ruling in *Mid-States*, is unjustified in view of that court's later holding in *Mason*, which supports the basic concept that means of employee communication are not so fundamental that they cannot be waived.

In the present case, the Board has ruled and in its brief suggests to the Court that the contractual prohibition against distribution is an "unreasonable impediment" to self organization; constituted an "unacceptable abridgement of the basic statutory policy of protecting employees"; and that the Company is guilty of "flagrant employer interference" with the right of employees to select their own bargaining representative. (Board brief, pp. 7, 9, 13). Such an attack would certainly indicate that severe consequences have resulted from the employer rule. Yet, curiously, in the instant case there is not the slightest evidence to even suggest that the no-distribution policy of the Company has ever been applied in a discriminatory manner so

as to deprive any employees in the bargaining unit of their right to support or select a labor organization of their own choosing. Further, and even more significantly, there is no evidence *at all*, nor any finding, in the Board's decision that the Employer's no-distribution policy did in fact impair or hinder the opportunity of employees to effectively support the labor organization of their choice. Not only does the Board in its decision fail to demonstrate that employees' Section 7 rights were seriously impaired, but its decision fails to rationally demonstrate that employee rights were interfered with in any way.*

Probably the most notable and most conspicuous feature of the Board's decision is the total absence of any analysis whatever of the effectiveness of alternative means or channels of communication available to employees. The Board freely acknowledges this in its Brief. (Board brief, p. 17). Perhaps the underlying reason for this startling absence of analysis can be found in the fact that the General Counsel's own witnesses conclusively established that the means of communication available to employees other than on-premises distribution were entirely effective. That testimony clearly showed that distribution at the entrances to and exits from the employer's property was just as effective a means of communication as would be on-the-premises distribution. For example, James Kelley who had been an employee of the Company in ex-

*In fact, the charge arose only after the Union's insistence on making a distribution in the plant several weeks after the Union president learned of this alleged right at a Union District Counsel meeting. (A. 96-97).

cess of nineteen years, testified that he had on numerous occasions distributed literature in behalf of the IUE at points of ingress to the Employer's premises Mr. Kelley unequivocally stated that, in making these distributions, he was able to distribute his material to every single vehicle entering or leaving the employer's premises. (A. 103). As recognized by the Board itself, effective distribution depends only upon receipt of the material being distributed, and not to any extent upon the location at which it is received.

> The distinguishing characteristic of literature as contrasted with oral solicitation — and a distinction to often overlooked — is that its message is of a permanent nature and that it is designed to be retained by the recipient for reading or re-reading at his convenience. *Hence the purpose is satisfied so long as it is received.* (Emphasis added.) (Footnote omitted.) *Stoddard-Quirk Manufacturing Company*, 138 NLRB 615, 620 (1962).*

Similarly, employees are not entitled to distribute on Company premises simply because the Employer delivers its newspapers in the plant. This Court has held

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*In *Stoddard-Quirk*, the Board singled out the plant entrances or exits as an appropriate place for distribution of literature. 138 NLRB 615, 620. By the same token, the heavy reliance by the Board as the plant being the uniquely appropriate place for distribution (Board brief, pp. 7, 14) is misplaced. The Board in *Stoddard-Quirk*, in discussing this Court's decision in *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U.S. 793 (1945), clearly indicated that the unique and appropriate character of the plant applied to solicitation, not distribution of literature. 138 NLRB 615, 620. See above quote.

that employees are not entitled to use a medium of communication simply because the employer is using it. *NuTone, Inc., supra,* 357 U.S. 357, 364.

In addition to the availability of effective distribution opportunities at entrances to and exits from the employer's property, it is important to note that in the instant case, unlike the factual situations existing in *National Labor Relations Board* v. *Gale Products, Division of Outboard Marine Corporation, supra,* and *National Labor Relations Board* v. *Mid-States Metal Products, Inc., supra,* where the employers restricted *both* distribution and solicitation rights, the Employer in the instant case imposes no restriction whatever upon solicitation by employees during non-work time.[10] Employees are perfectly free to discuss self-organization among themselves during their non-work time anywhere on Company property, including both work and non-work areas. But such unrestricted ability to fully discuss Section 7 rights anywhere on Company property — the place cited by the Board as uniquely appropriate for employees to obtain information (Board brief, pp. 7, 14) — is totally ignored by the Board while it maintains at the same time that the basis of their finding is freedom of employees '"... *to discuss self-organization among themselves* [*in the plant*] . . .'" (Emphasis added.) (Board brief, p. 17). There simply is no restriction on the employees' right or ability to do this.

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[10]The Board brief appears, incorrectly, to contend that the employer bans in-plant solicitation. (Board brief, pp. 14-15, 17).

Finally, although the waiver in this case cut off on-premises distribution of literature to employees, this Court recognized in a similar vein:

> Of course the rules had the effect of closing off one channel of communication; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances be protected in the use of every possible means of reaching the minds of individual workers ... *NuTone, Inc., supra,* 357 U.S. 357, 364.

It is not possible under the facts and circumstances of this case to reasonably conclude that Respondent's enforcement of the no-distribution agreement seriously impairs effective communication with its employees, or thereby hampers Section 7 rights. The effectiveness of alternative channels of communication and their non-discriminatory application neutralize any so-called benefits the Union may have received assuming, as the Board does (Board brief, p. 14), it bargained away this right out of its own self interest. Because of these alternative means available to employees, it is clear under the facts and circumstances of this case neither the incumbent Union, nor the Employer could — even if they wanted to — freeze out another union by such a waiver.

In failing to consider the effectiveness of alternative methods of communication the Board, in effect, did not attempt to make a showing that the no-distribution rule truly diminished the ability of employees to or-

ganize which this Court has pointed out is a vital consideration in determining the validity of such a rule. *NuTone, Inc., supra,* 357 U.S. 357, 363. The Board answers this stating that it need not consider alternative channels of employee communication, "since there is no evidence that the rule was needed to maintain production or discipline." (Board brief, p. 9) Citing *Republic Aviation, supra,* the Board stated "Such a ban 'must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline' (*id.* at 803-804, n. 10)". (Board brief, p. 10).

However, this only begs the question of actual impairment of Section 7 rights, and further, is not in point. Although the Court has sanctioned the Board's presumption rules in *Republic Aviation, supra,* 324 U.S. 793, 804, the Petitioner gave no justification for imposing its presumption rule which arose from cases involving *unilaterally* imposed no-distribution or no-solicitation rules to this case which involved a contractually agreed-to or *bilaterally* accepted no-distribution rule. While the validity of unilaterally imposed rules involves an examination of and balancing employees' statutory rights of self-organization against the employer's property rights such as control of production and discipline, the validity of a bargained-for waiver involves the balancing of potentially conflicting portions of the National Labor Relations Act, *i.e.,* employee rights and freedom of contract. Consequently, it is incorrect in this case to discuss a bargained-for waiver in

terms of the Company's need to maintain production and discipline in the plant. Freedom of contract is a right fundamental to the Act. *H. K. Porter Company* v. *National Labor Relations Board*, 397 U.S. 99, 108 (1970).[11] Thus, both this right and the right of employees under Section 7 must be examined to determine if one conflicts with the other, for neither right should be abridged unnecessarily; and where there is no necessary conflict neither right should be abridged. *National Labor Relations Board* v. *The Babcock & Wilcox Company*, 351 U.S. 105, 112 (1956); *Stoddard-Quirk, supra*, 138 NLRB 615, 617.[12] Where, as here, it has been shown that alternate means of communication are available and totally effective, there is no conflict between the fundamental rights involved, and the Company together with the collective bargaining representative of the employees should have the ability to contractually waive distribution rights on company premises.

In applying its presumption rule, the Board, after proof of the existence of a company's no-distribution rule presumes the ultimate fact that such a rule is invalid. However, as this Court has stated, there must be a rational relationship or connection between the fact proved and the ultimate fact presumed. See, *e.g.*, *Republic Aviation*, 324 U.S. 793, 804-805 n. 14. The Company submits that there was no such relationship here.

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[11] See further discussion of freedom of contract, *infra*, beginning at page 21.

[12] Although the Court in *Babcock & Wilcox* and the Board in *Stoddard-Quirk* discussed the conflict between employee rights and employer property rights, its language is even more applicable in this case when differing portions of the Act itself are in question rather than employer property rights.

Categorically, the fact proved in the cases where the Board developed the presumption was based on (1) an atmosphere of organizational activity and (2) unilateral no-distribution prohibitions. It was under these circumstances that the Board founded its presumption of invalidity rules. Experience taught the Board that with these circumstances present, workers' organization rights often were impaired. Thus, from these fact patterns arose the inference of invalidity. By comparison, those facts are absent here. As a result, the underlying rational relationship between the fact and the presumption is absent. As such, the presumption rule was arbitrarily applied in this case, there being no relationship shown to the facts upon which the rule was founded. *Republic Aviation Corporation* v. *National Labor Relations Board, supra; Republic Aviation Corporation,* 51 NLRB 1186 (1943), *enf'd* 142 F.2d 193 (2d Cir., 1944); *LeTourneau Company of Georgia,* 54 NLRB 1253 (1944), *enf. denied* 143 F.2d 67 (5th Cir., 1944); *Peyton Packing Company,* 49 NLRB 828, 843-844 (1943), *enf'd* 142 F.2d 1009 (5th Cir., 1944); *Walton Manufacturing Company,* 126 NLRB 697 (1960), *enf'd,* 289 F.2d 177 (5th Cir., 1961); *Stoddard-Quirk, supra.*[13]

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[13]The first case to adopt the presumption rule was *Peyton Packing* where the Board held:

> The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during lunch or rest periods, is an employee's time to use as he wishes without unreasonable re-

By the arbitrary and capricious application of its presumption rule here, the Board has erroneously excluded relevant factors from its consideration and in

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straint although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization, and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. *Id.*, at 843-844.

The presumptions were summarized in *Walton* as follows:

1. No-solicitation or no-distribution rules which prohibit union solicitation or distribution of union literature on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization, and are therefore presumptively invalid both as to their promulgation and enforcement; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline (footnote omitted).

2. No-solicitation or no-distribution rules which prohibit union solicitation or distribution of union literature by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule was adopted for a discriminatory purpose; (Footnote omitted) and are presumptively valid as to their enforcement, in the absence of evidence that the rule was unfairly applied. (Footnote omitted)

3. No-solicitation or no-distribution rules which prohibit union solicitation or distribution of union literature by non-employee union organizers at any time on the employer's property are presumptively valid, in the absence of a showing that the union cannot reasonably reach the employees with its message in any other way, or a showing that the employers notice discriminates against the union by allowing other solicitation or distribution. (Footnote omitted.). *Id.*, at 697-698.

doing so has unnecessarily abridged a fundamental right by mechanically accommodating another. *cf., Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

In a discussion concerning the accommodation of employer and employees rights when organizational activity is taking place, the Board itself stated:

> It follows, we believe, that the formulation of generalized rules in this area must be undertaken with caution for, patently, differing fact situations call for differing accommodations. The Supreme Court in the most recent of its utterances in this field pointedly reminded us in a closely related context that 'mechanical answers' will not avail 'for the solution of this non-mechanical complex problem in labor management relations.' *Stoddard-Quirk*, 138 NLRB 615, 617, citing *NuTone, Inc., supra*, 357 U.S. 357, 364.

In view of this admonition which is as equally applicable in this case, the Company submits that the application here of Board rules derived from unilateral prohibition cases is in error, and submits that the proper rule to be applied in cases involving bilateral prohibition rules is that such terms should be ruled presumptively valid as are other terms of the collective bargaining agreement, unless illegal, or expressly in violation of other sections of the Act. *H. K. Porter Company, supra*, 397 U.S. 99, 108 n. 6; *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*,

356 U.S. 342, 360 (1958); *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U.S. 678 (1944); *Armco Steel Corporation, supra*, 344 F.2d 621, 624; *Gale Products, supra*, 142 NLRB 1246, 1251-1252 (dissent). See Annot., 88 L.Ed. 770, 779-783 (1944). Such a test was indicated by the Board itself where, in discussing a bilateral rule,

> . . . [it] recognized the salutary purpose of refusing to disturb 'concessions yielded by either party through the processes of collective bargaining even where such concession may infringe upon rights guaranteed employees under Section 7 of the Act.' But we also pointed out that the validity of a particular concession or a waiver must depend upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver, or would unduly hamper the employees in exercising their basic rights under the Act ... *General Motors Corporation*, 158 NLRB 1723, 1726, citing *Gale Products, supra*, 142 NLRB 1246, 1248-1249.

Only through the application of such a test can the Board properly accommodate employee rights under Section 7 of the Act, and the equally fundamental freedom of contract guaranteed to the employees' bargaining representative and the company. Such accommodation can never be made through the imposition of rules of presumption which do not measure the validity of a bargained-for waiver of distribution in terms of

these rights. Only through such an accommodation can the Board properly determine whether the waiver "would unduly hamper the employees in exercising their basic rights under the Act." *General Motors*, id at 1726.

The Board readily acknowledges that there are many Section 7 rights which are waivable. See, *e.g.*, *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960) — waiver of the right to strike. *Local 174, Teamsters* v. *Lucas Flour Company*, 369 U.S. 95 (1962) — implied waiver of the right to strike resulting from a binding arbitration commitment for settlement of disputes. *National Labor Relations Board* v. *Spun-Jee Corp.*, 385 F.2d 379 (2d Cir., 1967) — implied waiver of the right of employees to bargain collectively through their chosen representative concerning the effects of a plant closure or removal. See also, *Armco Steel Corporation*, *supra*, 344 F.2d 621, 624.

The question therefore becomes: is there justification in the Act itself for finding that, while numerous other important rights of employees protected by Section 7 may be waived, distribution rights secured by that same Section 7 may not be waived by the statutorily authorized bargaining representative: the Employer respectfully submits that there is no basis whatever to be found in the Act for such distinction. Section 7 of the Act neither contains nor even suggests gradations of the rights secured thereunder. As shown by the above cases, the principle that rights guaranteed employees under Section 7 of the Act may in fact be

waived by the employees' bargaining representative with or without the consent of the bargaining unit members, is firmly settled. In fact, those important rights may be waived by the collective bargaining representative over the objections of a majority of the employees being represented. In addition, many of these rights are *expressly* protected by Section 7; it can hardly be doubted that a right only *inferentially* secured by Section 7, such as distribution of literature may not be waived by the incumbent and statutorily selected bargaining representative.

However, the Board argues that such rights are distinguishable from the right to distribute literature. The Board justifies this distinction by arguing that "[w]aiver of these [other] rights is permitted because they depend on collective action for their effectiveness, and the union is the arbiter of such action." (Board brief, p. 12). However, the right of employees to organize also depends on collective action. Under the Act and Board procedure,[14] in order for employees to choose or change a bargaining representative, they must act in concert with one another; a certain percentage of the employees in the appropriate unit to be represented must petition for representation and if an election is held by the Board, a majority of those employees voting must vote for representation. Alternatively, the Board argues that a waiver of distribution rights is permissible but only "in the economic area. . ." (Board brief, p. 10). But there is no evidence in this case to suggest that the Union leaflet

[14]See opposition to certiorari, pp. 2-3.

sought to be distributed was not an attempt to seek economic advantage. The Board admits as much in its Brief. (Board brief, p. 10). Moreover, to distinguish economic gain from organizational activity is a distinction without a difference in this case since in either event "the selection of the bargaining representative remains free," *Mastro Plastics Corporation* v. *National Labor Relations Board*, 350 U.S. 270, 280 (1956), and in either event adds to the economic power of the Union to gain further advantages from the employer. *American Communication Association* v. *Douds*, 339 U.S. 382, 401 (1950).

The decisions of the Courts and Board on the subject of unilateral and bilateral no-distribution rules together with an analysis of the facts and circumstances of this case warrants the conclusion that the Board should have *at a very minimum* examined the availability of effective alternate means of communication available. Certainly, it is most difficult to accept the Board's bare unsupported assertion that on-the-premises distribution rights are so fundamental and imperative to employees that an important part of the contractual agreement of the incumbent Union and the Employer must be totally nullified when the Board has not in any manner demonstrated that these individual interests are impaired by or sufficiently outweigh considerations of freedom of contract that have resulted in the no-distribution agreement.

II. The Board's Decision In This Case Is In Serious And Direct Conflict With The Principles Of Freedom Of The Collective Bargaining Process And Freedom Of Contract As Well As The Objectives Of Industrial Stability And Peace Central To And Underlying The Entire Act.

Section 9(a) of the Act prescribes that the bargaining representative is to be the exclusive representative of all of the employees within the bargaining unit.[15] This is true even though certain of those employees voted against representation by the particular union involved, and even though they may disagree with and object to principles governing their working conditions agreed upon by the union and their employer. See, *e.g.*, *J. I. Case Company* v. *National Labor Relations Board*, 321 U.S. 332, 339 (1944); *National Labor Relations Board* v. *Draper Corporation*, 145 F.2d 199, 203 (4th Cir., 1944). As stated by this Court in the *J. I. Case Company*, *supra*, decision:

> The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules .... 321 U.S. 332, 339.

The Court's admonition that there is to be no discrimination within the bargaining unit is especially true of discrimination based on union affiliation. *Radio Officers Union* v. *National Labor Relations Board*, 347 U.S. 17, 45 (1954).

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[15] 29 U.S.C. §159(a) (1964).

Thus, under Section 9 of the Act, the collective bargaining representative represents all employees including dissident as well as those loyal to the incumbent. This basic tenet was recently reiterated by the Supreme Court in *H. K. Porter Company, supra*, 397 U.S. 99, 108 n. 6:

> [T]he employer is not free to choose any employee representative he wants, and the representative designated by the majority of the employees represents the minority as well.

The authority conferred upon a labor organization accorded representation rights under Section 9 of the Act extends even beyond these principles. The Board, with the approval of the courts, has consistently held that a union, once elected by employees under the procedures specified in the Act, is entitled to function as those employees' representative for a reasonable period of time, even though, following the union selection, it has lost the support of a majority of the employees in the bargaining unit. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96 (1954). As the statutorily designated representative of the employees, the union may, contrary to the wishes of a majority of the employees in a bargaining unit, represent the employees to the extent of entering into a contract with the employer which controls and governs every aspect of the wages, hours, and working conditions of all employees in the bargaining unit. *Brooks, supra.*

It has been the Board in its decisions beginning with *Gale Products, supra*, through the present case, that

has divided employees into two classes — those dissident and those loyal to the incumbent bargaining representative. Here, the Board for the first time has held that a statutorily designated bargaining agent may contractually waive the right of its unit members to distribute on company property, presumably receiving a *quid pro quo* in return for that waiver which results in benefit to its unit members, and thereafter completely ignore and repudiate its contractual commitment while leaving the Employer bound to abide by and honor the concession which it made in order to gain the union's assent to a no-distribution policy. Under the Board's decision, despite the agreement of the employees' representative and the Employer to the contrary, unit members are perfectly free to distribute literature on company property not only in behalf of rival unions, but also in behalf of the incumbent Union which was an actual party to the contractual commitment that no such distribution by employees it represented would be permitted. Such an interpretation of the Act directly undermines the authority of a collective bargaining representative to make decisive and binding commitments on behalf of the employees for whom it speaks, and at the same time undermines the fundamental tenet of freedom of contract by substituting the Board's judgment for that of the contracting parties.

As stated by one commentator, "among the many competing goals of national labor policy, two have been frequently proclaimed and staunchly defended, almost but never quite to death, by the Supreme Court of the United States. One is industrial peace; . . . the other

is freedom of contract, . . . — collective contract, to be sure." (Footnotes omitted)[18] This Court in its recent ruling that the Board was without power to compel an employer and a union to agree to a substantive term in a collective bargaining agreement, held that freedom of contract is not only a fundamental principle of the Act, but recognized that "the National Labor Relations Act is grounded on the premise of freedom of contract." *H. K. Porter, supra,* citing *United Steelworkers of America, AFL-CIO* v. *National Labor Relations Board,* 389 F.2d 295, 300 (1967).

In addition, the Board may not interfere with the parties' freedom of contract except when a clause in the agreement violates a specific statute and is illegal. *Infra,* pp. 16-17. Although the Company recognizes that such limitations are placed on the parties' freedom of contract just as limitations are placed on employee rights of self-organization, *Republic Aviation, supra,* 324 U.S. 793, 797, 798, the Company maintains that where these potentially conflicting rights can be accommodated without either being subordinated to the other such as in this case, it was unnecessary and erroneous for the Board to step in and abridge the Company and Union's freedom of collective bargaining. *Babcock & Wilcox Company, supra,* 351 U.S. 105, 112.

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[18] Wellington, *Freedom of Contract and the Collective Bargaining Agreement,* 112 Univ. of Pennsylvania Law Review, 467 (1964); citing *Local 174, Teamsters* v. *Lucas Flour Company, supra; United Steelworkers* v. *Warrior and Gulf Navigation Company, supra; National Labor Relations Board* v. *Insurance Agents Union,* 361 U.S. 477 (1960); *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957); *National Labor Relations Board* v. *American National Insurance Company,* 343 U.S. 395 (1952).

The paramount importance of freedom of contract in the scheme of the Act was specifically noted by the United States Court of Appeals for the Sixth Circuit in its refusal to enforce a Board order finding an employer guilty of violating Section 8(a)(1) of the Act by its enforcement of an agreement with the incumbent union that bargaining unit employees would not distribute literature on company premises. In that case, the court stated:

> Freedom of contract is perhaps one of the most important rights enjoyed by labor unions and employers. The Board has no power to sit in interference with the exercise of that right or to sit in judgment in the wisdom of substantive contract provisions. *It may interfere only when a clause violates a specific statute and it is illegal. . . . The Board has not pointed out any specific provision of the Act which is violated by the no-distribution clause.*
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> *Neither the union nor employer are required to justify for the Board their insistence on particular subjects to be embodied in an agreement so long as they are not illegal.* (Emphasis added) *Armco Steel Corporation, supra,* 344 F.2d 621, 624.

In rejecting the Board's finding that an incumbent union lacked the authority to waive solicitation and distribution rights of employees otherwise protected by Section 7 of the Act, the United States Court of Appeals for the Seventh Circuit expressed these same concerns:

> The 'desirability' of collective bargaining contract provisions from the standpoint of either the employees or the employer is not the measure of their validity. Moreover, the arrangement here involved is conducive to the stabilization of labor relations during the contract period and thus in harmony with a prime object of the Act. *Gale Products, supra,* 337 F.2d 390, 392.

The impropriety of Board interference with freedom of contract was also recently reiterated by this Court in *H. K. Porter Company:*

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions. . . . But, it was recognized from the beginning that an agreement might in some cases be impossible, and it was never intended that the government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.
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> Notwithstanding this language of the court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make. . . .
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> * * *

> The Board's remedial powers under Section 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. *H. K. Porter Company, supra*, 397 U.S. 99, 103-108.

Finally, "even if government were indeed wiser than the parties, the cost of substituting government decision-making for private decision-making should not be ignored by a society that depends, as ours does, upon plural power centers to sustain its democracy." (Footnote omitted.) *Wellington, supra*, at 473.

Another fundamental principle inherent in the very structure of the Act is the importance of not disturbing the actual agreement of the parties. In *United Aircraft Corporation* v. *National Labor Relations Board*, 440 F.2d 85, 96 (2d Cir., 1971), for example, the court noted: "The company probably considered the no-solicitation ban to be an important bargaining objective, and the agreement should not be lightly overturned." This same reasoning was emphasized by the Sixth Circuit in refusing enforcement of the Board's order in *Armco Steel Corporation*:

> Presumably the union obtained from Armco a *quid pro quo* for its assent to the clause. The parties to a contract cannot be restored to their status quo when that clause is deleted from their contract without mutual consent. *Armco Steel Corporation, supra*, 344 F.2d 621, 625.

As the court decisions mentioned hereinabove clearly recognize and demonstrate, the essential purpose of the Act is the promotion of industrial peace and stability. The primary means for obtainment of these objectives envisioned by the Act are freedom of the collective bargaining process and enforceability of agreements between an employer and labor organizations reached through that process. The Board's decision in this case directly undermines those policies.

Even aside from this deleterious effect of the Board's decision in the instant case the Company submits that there are yet further compelling reasons demonstrating that the Board's decision will inevitably and certainly promote industrial strife and instability in contravention of the express purpose of the Act:

Under the Board's present decision, as under its prior decisions on the issue here presented, disenchanted employees would be permitted to distribute literature in behalf of rival unions throughout the lives of the collective bargaining agreements from the very inceptions of those agreements. Thus, although the employees covered by a three year contract may not be in a position to petition for a change in or removal of their bargaining representative for a number of years, they may nevertheless, contrary to the specific agreement of the employer and the union, continually stir up animosity and instability during the entire lifetime of the contract.

Moreover, under the Board's new policy as annunciated in the present case, employees supporting the

very union that agreed to the no-distribution policy would be able to totally ignore that agreement and distribute literature in answer to the claims of employees supporting rival labor organizations. Thus, most probably, an atmosphere of claim and counterclaim, constant friction, internecine struggle and the very antithesis of industrial stability and peace may not only be permitted but also promoted, all contrary to the agreement of the incumbent union and the employer.

In addition to the tension that this decision will most probably create, further problems are caused where, in an attempt to minimize its ruling, the Board would permit the Company to enforce its agreement with the union to prescribe distribution of "institutional" material on its property by employees. Rather than being helpful, such a ruling only lends further instability to the Board's decision by leaving the Company completely on its own to resolve the rather perplexing question of what constitutes "institutional" as opposed to other types of union literature identified by the Board's broad and nebulous labels. Accordingly, should the Board's order be enforced by this Court, the Company acts completely at its peril in prohibiting the distribution of any literature whatsoever on its property, facing a contempt citation should it mistakenly determine literature to be "institutional" which, through the application of some unknown formula, is later found to be related to Section 7 rights of employees. The totally unworkable and impractical nature of the distinctions drawn and categories of literature established by the Board in this case is readily apparent when reference

is made to a basic and simple illustration. For example, may a union convert literature otherwise "institutional" into literature related to Section 7 rights by merely adding a notation at the bottom of that literature reading: "Be sure to attend the meeting this Friday" or "Join the union today"?

In summary, the primacy of the fundamental tenets of freedom of contract and enforceability of the agreement of the parties, both of which are designed to promote and foster industrial peace and stability are undermined in this case. The Board order, depriving the employer of its *quid pro quo* derived through the collective bargaining process, is wholly without foundation in the Act, contravenes important and fundamental objectives of that Act, and, accordingly should be denied enforcement.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that the judgment of the court of appeals should be affirmed.

Respectfully submitted this 19th day of December, 1973.

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